JOHARI KHALID & ANOR.

v.

MOHD. ZAMRI KHALID & ANOR.

FEDERAL COURT, KUALA LUMPUR
SALLEH ABAS LP
WAN SULEIMAN FJ
GEORGE SEAH FJ
[CIVIL APPEAL NO. 276 OF 1983]
11 JULY 1984

TORT: *Negligence - Road accident - Question of liability - Finding of facts by lower Court - Whether finding could be sustained - Rejection of independent witness' evidence without giving reasons - Whether 1st respondent's evidence probable - Contradiction in 1st appellant's case - Whether could weigh the case in respondents' favour.*

In 1976, the 1st respondent was involved in a road accident involving three motorcycles. The parties had agreed on the quantum of damages and the issue of liability was tried before the trial Judge. The respondents and appellants gave two diametrically different versions as to how the accident occurred. The 1st respondent alleged that there was a police roadblock, consisting of a police landrover and two motorcycles. The accident was attributed to the roadblock and stationary motorcycles. The 1st appellant disputed this version and produced five witnesses to support their contention that there was no such roadblock and that the vehicles were on the move. The 1st appellant's version was confirmed by an independent witness whose evidence was rejected by the learned trial Judge without reasons being given. The learned trial Judge accepted the 1st respondent's version because in his view the 1st respondent had given evidence consistently and that the 1st appellant's evidence was not consistent and full of contradictions. The appellants appealed.

Held:

[1] Having regard to the 1st respondent's and 1st appellant's evidence, it was inherently improbable that there was a roadblock and since the basis of the 1st respondent's case is the roadblock, his case remains unproved.

[2] There is no reason for the trial Court to reject the testimony of the independent witness.

[3] The contradictions in the 1st appellant's evidence relate to details and do not affect the crux of the case.

[4] The contradictions alluded to could not be a basis to weigh the case in favour of the respondents.

[Appeal allowed.]

For the appellants - P.M. Mahalingam; Sr. Federal Counsel; Attorney-General's Chambers
For the respondents - David Tay (Mr.Christopher Foo with him); M/s. Murphy & Dunbar

JUDGMENT

Salleh Abas LP:

This is an accident case involving three motorcycles which took place at 5 1/4 milestone Temerloh/Triang road on 21 August 1976 at about 12.30 p.m. The first motorcycle CA 9349 was ridden by one Saleh bin Razak (deceased), who was killed in that accident. He

was survived by his pillion rider, the first plaintiff, who sustained very serious permanent injuries. The second motorcycle CD 4976 was ridden by one Tiang Seng who was also carrying a pillion rider. The third motorcycle was a police motorcycle BAB 8068 ridden by first defendant, police constable 58222.

The first plaintiff, the pillion rider on motorcycle CA 9349 sued the defendant and the Government of Malaysia for damages in respect of the injuries sustained by him. Parties had agreed on the quantum of damages and so the issue that went on trial before the learned trial Judge was only the question of liability. The trial ended in favour of the first plaintiff and so the defendants appealed.

After hearing arguments on both sides we allowed the appeal and here are our reasons for allowing it.

We appreciate that this appeal is mainly involved with the finding of facts by the Court below and as such we should be slow or reluctant to disturb the finding unless it could be shown that the finding could not be sustained having regard to the evidence.

The plaintiff blamed the first defendant for causing the accident, whilst the first defendant on the contrary blamed the deceased rider. There were thus two diametrically different versions as to how the accident occurred. According to the first plaintiff, the deceased and he were riding the motorcycle in question from the direction of Temerloh towards Triang. At the material time and place, the first plaintiff saw what appeared to be a police road-block, consisting of a police landrover and two motorcycles. All the three vehicles were parked and stationary in one line across the road in such a way that there was hardly any space left for the deceased's motorcycle which was then approaching to pass through. The motorcycle nearest to the landrover was a civilian motorcycle, presumably CD 4976, whilst the other motorcycle was a police motorcycle presumably BAB 8068. In an attempt to pass through the barrier the deceased's motorcycle collided with the civilian motorcycle CD 4976, which was in the middle of the road and thereafter it collided with the defendant's motorcycle BAB 8068. It is clear that the key to the plaintiff's view on the accident is that all these motorcycle were stationary and that the police were holding a roadblock, using their landrover and the defendant's motorcycle BAB 8068.

The first defendant disputed this version. According to him there was no roadblock at the material time and place and the defence produced five witnesses to support this contention. The first defendant testified that 8 police constables headed by a police inspector after finishing their roadblock duties were travelling home to Temerloh in a convoy consisting of one landrover and four motorcycles. The landrover which led the convoy and the four motorcycles were all travelling in a single file, each at a distance of 40 to 60 feet to one another with the first defendant's motorcycle being in a second position from the landrover and two other motorcycles behind him. As they were approaching the scene of the accident the first defendant said he saw the deceased's motorcycle following another motorcycle coming from the opposite direction. The deceased's motorcycle knocked into the rear of the civilian motorcycle and then knocked into his (first appellant's) motorcycle.

The foundation of the defendant's version is that the police party was on the move and not stationary as claimed by the first plaintiff and that there was no roadblock at the material time.

Except for the plaintiff's testimony, all the police personnel, DW1, DW2, DW4, who gave evidence, denied that they were holding a roadblock at the material time and place. Their evidence was confirmed by an independent witness, DW3, who said that whilst he was driving his car towards Temerloh he was overtaken by the police vehicles travelling in the same direction and that ten minutes later he arrived at the scene of the accident. In rejecting the first defendant's version the learned trial Judge gave no reason for refusing to accept the evidence of DW3, neither did he give any consideration to the improbability of the police party setting up a roadblock within 10 minutes that had elapsed between the time the police party overtook DW3's car and the time when DW3 arrived at the scene of the accident. It seems, however, that the learned Judge accepted the first plaintiff's version that there was a roadblock, because in his view the first plaintiff's evidence was consistently given throughout the various stages of the examinations before the Court, and also because the first defendant's evidence was not consistent and full of contradictions. But let us consider these facts: If the police party did actually set up a roadblock, one would not have expected the deceased to have tried to run through it without stopping. One would have expected him to slow down and stopped. Yet this is not what the first plaintiff had said. On the contrary he clearly said that the deceased's motorcycle was not slowing down at all and that it was travelling at a fast speed and that neither did the deceased rider take any evasive action, nor did the first plaintiff tell the deceased to stop or slow down. Instead he left the deceased to steer through whatever space he could manouvre through the barrier. Is such a behaviour consistent with the existence of a roadblock? Another factor is the lightning speed at which the police erected a roadblock. Is it probable or even possible that they could have erected it within such a short time, less than 10 minutes? There is no reason at all for the Court to reject the testimony of DW3.

In our view the first plaintiff's evidence is inherently improbable, and as such his case remains unproved. The contradictions in the defendant's evidence to which the learned Judge had alluded could not be a basis to weigh the case in favour of the plaintiff. The so-called contradictions merely relate to the question whether the accident was caused by the deceased's motorcycle knocking into the civilian motorcycle CD 4976 first before it finally collided with the first defendant's motorcycle or whether it knocked into the first defendant's motorcycle straight-away. In the police report the first defendant did not specify which motorcycle collided with his motorcycle, nor did he say that the deceased's motorcycle collided with the civilian motorcycle CD 4976 first before colliding with his. This omission, in our view, is a matter of details and does not affect the crux of the matter which is, whether or not there was a roadblock, official or *ad hoc*, or otherwise.

That the civilian motorcycle CD 4976 was involved in the accident was undeniable. There was a report regarding the damage to this motorcycle and that there was a police report lodged by its rider, although a witness, namely DW5, who was called by the defence to give evidence turned out to be only the owner of the machine and not the rider who was involved in this particular accident. He confirmed, however, that his machine was involved in the accident and that the rider was his brother who happened to have the same name and identity card number and that at the time of the trial his brother was working at an unknown address in Sabah as a bulldozer driver and therefore could not be called.

In any case the so-called contradictions of the first defendant's evidence were not contradictions because these are in fact confirmed by the plaintiff's own evidence when he said that the deceased's motorcycle first collided with a civilian motorcycle in the centre of the roadblock and later with the defendant's motorcycle.

As the basis of the plaintiff's case is the existence of the roadblock and we are of the view that having regard to the plaintiff's own evidence and the defendant's evidence, it was inherently improbable for the police to set up such roadblock, his case remains unproved.

We therefore allowed the appeal with costs and the deposit to be refunded to the appellants.

Also found at [1984] 2 CLJ 276